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NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>THEODORE KAAKE,<br><br>Defendant and Appellant. | C048061<br><br>(Super. Ct. No. 04F01115) |

A jury found defendant Theodore Kaake guilty of robbery (Pen. Code, § 211; further section references are to the Penal Code) and the trial court found he had four prior serious felonies (§§ 667, subd. (a); 667, subds. (b)-(i); 1170.12). Sentenced to state prison for an aggregate term of 35 years to life, defendant appeals. He contends the trial court erred in denying his motion to suppress evidence. (§ 1538.5.) He also notes an error in the calculation of his custody credits. We

shall order defendant be awarded 36 additional days of custody credit and otherwise affirm the judgment.

BACKGROUND

The facts as presented at the hearing on defendant's suppression motion are as follows, assuming every fact in support of the ruling of the trial court. (*People v. Woods* (1999) 21 Cal.4th 668, 673.)

Officer Ret Townsend was dispatched on February 2, 2004, to a robbery purse snatch at Arden Fair Mall. Witness James Traver described the robber as a white male, approximately 40 years old, 5'10" to 6' tall, medium build, thick salt and pepper moustache, thick, dark-framed prescription glasses, and wearing a denim jacket, jeans and a baseball cap. Witness Fran Traver described the robber as a white male, around 43 years old, 5'10" to 6' tall, stocky build, salt and pepper moustache, thick black prescription glasses frames, and wearing a blue denim jacket, jeans and a ball cap. Witness Jawad Ahmad described the robber as a white male, 38 to 40 years old, 5'10" to 6' tall, about 170 pounds, thick salt and pepper moustache, dark prescription glasses frames, and wearing a denim jacket, jeans and a ball cap. The victim described the robber as a white male in his 50's, 6' to 6'2" tall, slender, with brown hair and a clean appearance.

One of the witnesses saw the license plate of the get-away car. While the robber was looking for the get-away car, the witness heard him yelling, "Hey, Steve, where are you?" A check

of the license plate determined the car was registered to Bettie Kaake at 1402 Brewerton, apartment 359.

Officer Randy Lozoya was dispatched to Bettie Kaake's apartment complex. He reported to Officer Townsend that he had located the get-away car and Townsend drove over to meet Lozoya. The car was parked three buildings away from Bettie Kaake's apartment, even though there were available spaces near the apartment. There were bloodstains on the passenger seat and console of the car. Officer Lozoya understood from the dispatch call that there had been a struggle during the robbery, and that the suspect was possibly injured and possibly armed (although dispatch did not actually mention a weapon).

Prior to Officer Townsend's arrival at the apartment complex, Officer Lozoya had spoken with the apartment manager, Kirsten Sjoberg. Sjoberg told Officer Lozoya that a single tenant by the name of Bettie Kaake lived in apartment 359, that she was in her 70's and was the only tenant on lease. Officer Lozoya asked the manager if anyone else lived with Bettie Kaake. Sjoberg reported that she had seen a while male in his early 50's, approximately 5'10", 165 pounds, thin build, black and gray hair and a moustache, smoking on the back porch a month earlier. Sjoberg had seen the man several times, and believed he may be Bettie Kaake's son and believed he may be living there with her.

Officers Lozoya and Townsend went to Bettie Kaake's apartment, knocked on the door, looked in the windows, and yelled "police department, come to the door" for about five

minutes. They received no response and heard nothing from inside the apartment. Concerned that Betty Kaake may be inside and either already a victim or soon to be one, the officers called their sergeant and got permission to enter the apartment. The apartment manager attempted to reach Bettie Kaake at work and Bettie Kaake's emergency contact person, but got no answer. She then gave her key to the officers and the officers entered the apartment to do a welfare check on Bettie Kaake and the possible suspect.

While securing the apartment and determining no one was inside, the officers saw a photograph of a white male with silver and black hair, a thin build, a moustache, and dark-rimmed prescription glasses. Sjoberg, the apartment manager, also saw the photograph after the apartment was clear and commented that the man in the photograph was the same man she had seen smoking on the back porch. An envelope containing the names "Theodore Kaake, Sr." and "Theodore Kaake, Jr." and a Soledad State Prison, California Department of Corrections number, was in plain view on a nightstand. Officer Lozoya also opened a manila folder and saw the name "Theodore Kaake," a social security number, a California Department of Corrections number and an address on the document inside. The officers left.

Detective Phillips used the name "Theodore Kaake" found in the police report, but not the additional information, to obtain a photograph of defendant from the "County Mug system." She then used that photograph in a February 4, 2004, photo line-up,

and the victim identified defendant as the robber. Detective Phillips, Officer Townsend and Officer Bell then returned to Bettie Kaake's apartment complex to arrest defendant, arriving around 10:00 a.m. that same day.

When the officers arrived, they saw a man with gray hair (whom they believed looked similar to the person in the photograph in the apartment) walking away from the complex in the area near and approximately 20 feet from Bettie Kaake's apartment. The officers asked the man for identification and asked where he lived. The man produced a driver's license with the name "Steven Gregory Smith" and said he lived in Bettie Kaake's apartment. Officer Townsend remembered that the robber had been calling out to a "Steve" when looking for the get-away car and handcuffed Steven Smith. Detective Phillips then asked Smith if defendant was inside the apartment. Smith said defendant was in the back bedroom, that the door was open and told the officers they could go in.

The officers announced themselves at the door and then entered the apartment with Smith. Defendant was arrested as he was walking out from the back bedroom area into the living room. At the time of his arrest, defendant had a pawn slip in his pocket.

Later that day, Detective Phillips returned to the apartment and spoke to Bettie Kaake. She informed Bettie Kaake that her husband (defendant) and son (Steven Smith) had been arrested. Bettie Kaake was very cooperative and gave her permission to search the apartment. Bettie Kaake also told the

detective that either her husband or son had driven her to work on February 2, 2004. Detective Phillips asked Bettie Kaake if defendant had a denim jacket, and Bettie Kaake told her he did and had asked how to get blood out of it. Bettie Kaake gave the detective defendant's denim jacket and jeans that were drying on the patio, another blue jacket, a pair of defendant's boots and two of defendant's baseball caps. She also told the detective that her son, Steven Smith, had been living there for the past few months.

Detective Phillips testified that, had the officers not entered the apartment on February 2, 2004, and retrieved defendant's name as associated with the address, she would have conducted a computer check, including "Lopes" and the "County Mug system," to obtain names associated with the address. Detective Phillips also testified that, even if she did not obtain defendant's name from a computer check, she would have gone back to Bettie Kaake's apartment as the next part of her routine investigation and talked to Bettie Kaake when the woman returned home. She would have asked Bettie Kaake who else lived at the address and who had used her car on the day of the robbery. Finally, Detective Phillips testified she would have conducted surveillance on the apartment to wait until someone matching the suspect's description came in or out of the apartment or car.

## DISCUSSION

### I

Defendant brought a motion to suppress evidence of the information obtained from the manila folder, the photograph, and evidence obtained therefrom including the officers' eventual contact with defendant on the ground that the discovery of such evidence was the product of the officers' illegal entry into Bettie Kaake's apartment on February 2, 2004, and therefore, was tainted.[1] He also sought to suppress evidence of the pawn ticket on the ground that its discovery was the result of the officers' illegal entry into the apartment on February 4, 2004. The trial court denied his motion to suppress the evidence obtained as a result of the February 2, 2004, entry on multiple grounds: the hot pursuit, exigent circumstances and welfare check exceptions to the warrant requirement, and the doctrine of inevitable discovery.[2] We agree that the doctrine of inevitable discovery rendered that evidence admissible. We also agree with the trial court that evidence of the pawn ticket was admissible because

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[1] Although Bettie Kaake was the only person on the lease for the apartment, defendant and Steven Smith lived in the apartment and the People do not contend defendant lacked standing.

[2] The trial court granted the motion to suppress the information (the name "Theodore Kaake," social security number, California Department of Corrections number and address) found inside the manila folder, since the evidence was not in plain view, but rather, the officer opened the folder to retrieve the information.

the officers obtained consent to enter the apartment on February 4, 2004.

In reviewing the trial court's resolution of a motion to suppress evidence, we accept the facts found by the trial court, if supported by substantial evidence, and apply our independent judgment as to the legal conclusion. (*People v. Williams* (1988) 45 Cal.3d 1268, 1301; *People v. Loewen* (1983) 35 Cal.3d 117, 123.)

We first address the officers' entry into Bettie Kaake's apartment on February 2, 2004. As a result of that entry, law enforcement viewed a photograph of a white male with silver and black hair, a thin build, a moustache, and dark-rimmed prescription glasses. They also obtained the names "Theodore Kaake, Sr." and "Theodore Kaake, Jr." and a Soledad State Prison, California Department of Corrections number from an envelope. Law enforcement used the name "Theodore Kaake," but not the additional information, to obtain a photograph of defendant from the "County Mug system."[3] The victim thereafter identified defendant as the robber from a line-up using the photograph from the "County Mug system." Law enforcement then returned to Bettie Kaake's apartment complex to arrest defendant. They saw Steven Smith (whom they believed looked similar to the person in the photograph seen in the apartment) in the parking lot and detained him. Steven Smith told the

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[3] Law enforcement was also able to obtain defendant's birth date.

officers that defendant was currently inside the apartment. Defendant contends his identification, address and the officers' knowledge of his presence in the apartment at the time of his arrest were the result of the officers' illegal entry into the apartment.

The doctrine of inevitable discovery provides that illegally obtained evidence is nevertheless admissible if it would have been inevitably discovered independent of the improper police conduct. (*People v. Robles* (2000) 23 Cal.4th 789, 800.) "Under the inevitable discovery doctrine, illegally seized evidence may be used where it would have been discovered by the police through lawful means. As the United States Supreme Court has explained, the doctrine 'is in reality an extrapolation from the independent source doctrine: *Since* the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.' [Citation.] The purpose of the inevitable discovery rule is to prevent the setting aside of convictions that would have been obtained without police misconduct. [Citation.]" (*Id.* at pp. 800-801.)

"If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale [of the exclusionary rule] has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense." (*Nix v. Williams* (1984) 467 U.S. 431, 444 [81 L.Ed.2d 377, 387-388], fn. omitted; *People*

*v. Huston* (1989) 210 Cal.App.3d 192, 221 [“The test, as to the likelihood of eventual discovery, is not one of certainty, but rather of a reasonably strong probability.”].)

Even assuming the officers’ entry into Bettie Kaake’s apartment was unlawful and the evidence obtained therein was the fruit of the unlawful entry, the evidence was admissible because the officers would have obtained it even without police misconduct. The officers had obtained Bettie Kaake’s name and address, and knew she was the registered owner of the get-away vehicle, prior to their entry into the apartment. They also knew she had someone living with her who generally matched the description of the robber, since the apartment manager had seen a while male in his early 50’s, approximately 5’10”, 165 pounds, thin build, black and gray hair and a moustache. Detective Phillips testified that, had the officers not entered the apartment and retrieved defendant’s name as associated with the address, she would have conducted a computer check, including “Lopes” and the “County Mug system,” to obtain names associated with the address. Thus, law enforcement would likely have obtained defendant’s name, address, and, thereafter, mug shot photograph from a routine computer check.

Moreover, Detective Phillips testified that, even if she did not obtain defendant’s name from a computer check, she would have gone back to Bettie Kaake’s apartment as the next part of her routine investigation and talked to Bettie Kaake when she returned home. She would have asked Bettie Kaake who else lived at the address and who had used her car on the day of the

robbery. In all reasonable likelihood, Bettie Kaake would have provided the detective with defendant's and Steven Smith's names at that point, particularly since she was extremely cooperative even after the arrests of her husband and son. Finally, Detective Phillips testified she would have conducted surveillance on the apartment to wait until someone matching the suspect's description came in or out of the apartment or car.

Thus, there is at least a strong probability that law enforcement would have inevitably obtained defendant's identity, address, and consequently, his photograph from the "County Mug system" within the same time frame, even if the officers had not entered the apartment on February 2, 2004. There is also a strong probability that the officers would have stopped and questioned Steven Smith outside the apartment on February 4, 2004, even if they had not seen the photograph inside the apartment. Steven Smith was seen walking to a car from the area of Bettie Kaake's apartment (approximately 20 feet from the apartment). The officers knew that two men were involved in the robbery, including a man possibly named "Steve." There is every reason to presume the officers would have stopped and questioned Steven Smith when they saw him coming from the area of the apartment, even if they had not seen a photograph of someone with a similar appearance inside Bettie Kaake's apartment. Thus, they would have inevitably discovered through Steven Smith that defendant was in the apartment at the time.

Having concluded the trial court properly denied the motion to suppress evidence obtained as a result of the officers'

February 2, 2004, entry into the apartment based on the doctrine of inevitable discovery, we need not discuss the community welfare exception to the warrant requirement, hot pursuit or exigent circumstances.

This brings us to the February 4, 2004, arrest. Defendant contends the officers' entry into the apartment to effectuate his arrest was unlawful. Thus, he argues, the search incident to his arrest wherein the officers obtained the pawn ticket for the victim's watch was unlawful and the pawn ticket must be suppressed. We disagree. The officers' entry into the apartment leading to defendant's arrest was with the consent of resident Steven Smith. Thus, the evidence was admissible.

When Officer Townsend stopped Steven Smith, he first asked for identification. The officer remembered that the get-away driver's name was possibly "Steve" and handcuffed Steven Smith when he discovered his name was Steven. Officer Townsend then asked Steven Smith where he lived and Smith told the officer he lived in Bettie Kaake's apartment. The officer then asked if defendant was inside and Smith said he was, that the door was open and gave the officers permission to enter the apartment. The officers then entered the apartment with Smith.

"The extent of [a] consent is a question of fact for the trial court just as the voluntary nature of the consent is such a question." (*People v. Hickens* (1958) 165 Cal.App.2d 364, 368.) Steven Smith lived in the apartment and, after being handcuffed himself, clearly gave the officers permission to enter, specifically in response to Officer Townsend's question

about defendant's location. Thus, the trial court's finding that Smith gave valid consent for the officers to enter the apartment to arrest defendant is supported by substantial evidence and the evidence obtained as a result of that entry and arrest is admissible.

II

Defendant contends, and the People agree, the trial court erred in calculating his custody credits. Defendant received 249 days of custody credit, consisting of 217 actual days and 32 days of conduct credit. (§ 2933.1, subd. (c).) Defendant, however, served 248 actual days in custody between his arrest on February 4, 2004, and sentencing on October 8, 2004, entitling him to 37 days of conduct credit, for a total of 285 days of custody credit. Therefore, the judgment must be modified accordingly.

DISPOSITION

The judgment is modified to award defendant with 248 actual days and 37 conduct days for a total of 285 days of custody credit. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting this modification and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

BLEASE, Acting P. J.

I concur:

HULL, J.

I concur in the result.

I am of the view that the officers' initial entry into Betty Kaake's apartment was justified by the doctrine of exigent circumstances. Consequently, I need not address the doctrine of inevitable discovery.

In my view, the following argument as set forth in the People's brief, is correct in all respects.

"A warrantless entry of a private dwelling is presumptively unreasonable within the meaning of the Fourth Amendment to the federal Constitution. (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 122; *People v. Cook* (1978) 22 Cal.3d 67, 97; *People v. Ramey* (1976) 16 Cal.3d 263, 270.) An established exception to the warrant requirement is when 'exigent circumstances' exist to justify a warrantless entry or arrest. Exigent circumstances means an emergency situation requiring swift action to prevent imminent danger or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence. (*People v. Wharton* (1991) 53 Cal.3d 522, 577.) The People bear the burden of establishing that exigent circumstances justified the entry. (*People v. Williams* (1988) 45 Cal.3d 1268, 1300.) There is no litmus test for determining whether such circumstances exist, and in each case, the claim of an extraordinary situation must be measured by the facts known to the officers. (*Wharton*, *supra*, at p. 577.)

"Exigent circumstances have been found where there is reasonable cause to believe additional suspects or potential victims are in a residence. (*Tamborino v. Superior Court* (1986)

41 Cal.3d 919, 924, citing *People v. Keener* (1983) 148 Cal.App.3d 73, 77.) In *Tamborino*, officers received information of a robbery with an injured and bleeding victim. When police arrived at the apartment complex, they saw blood spots on the outside of the apartment and received word from a bystander that an injured person was inside. The police identified themselves, knocked on the door and received no response. They entered the apartment and found the defendant bleeding, although at the time the officers did not know if the defendant was the victim or a suspect. After handcuffing him, the officers reentered to see if there were any other victims in the apartment. Once inside, they found cocaine residue and narcotics paraphernalia in plain sight. (*Tamborino*, *supra*, at pp. 921-922.) The officers' warrantless entry was justified by the exigent circumstance of the need to quickly locate additional victims. (*Id*. at p. 924.)

"In this case, the evidence then available to Officers Lozoya and Townsend provided a substantial basis for believing that Bettie Kaake might be a potential victim of the robbers, that the robber and/or Bettie Kaake might be in her apartment, and that Bettie Kaake might be in imminent danger in her apartment with the robber. About an hour after the robbery, the car in which the robber had driven away from the mall was found about 100 yards from the apartment of Bettie Kaake, the registered owner of the car. [] There were parking spaces available outside the [*sic*] Bettie Kaake's apartment. [] Kaake's apartment was approximately eight miles from the mall. [] The robber was described to Officer Lozoya as a White male

in his fifties, with glasses. [] The robber was described to Officer Townsend as a White male in his late thirties to early forties, about five feet ten inches to six feet tall, with a salt-and-pepper moustache, and dark-framed prescription glasses. []

"Officer Lozoya believed that there had been a struggle with the robber and that the robber was possibly armed. [] Officer Lozoya observed a red fluid smear measuring about three by five inches, which appeared to be blood, on the right front passenger seat of the car. [] Officer Townsend observed what appeared to be bloodstain splotches and/or smudges smaller than a hand on the front passenger seat, seatbelt latch, and floor and bloodstain drops and a smudge on the console of the vehicle. [] The officers were advised by the apartment manager that Bettie Kaake was in her seventies, was a single tenant, and was the only person on the lease; that Bettie Kaake may have two cars; that the manager had seen a White male in his late forties or early fifties, five feet, ten inches tall, 165 pounds, with black and gray hair, a thin build, and a moustache, smoking a cigarette on the porch of the apartment about a month before; and that the manager assumed the man was Bettie Kaake's son, who was also living in the apartment. [] The apartment manager telephoned Kaake's work number and Kaake's granddaughter, who was listed as her emergency contact, but there was no answer at either number. []

"No one responded inside Bettie Kaake's apartment when Officers Lozoya and Townsend knocked on the door and windows and

yelled into the apartment. [] Before unlocking the apartment door and entering the apartment, the officers directed the apartment manager to stand behind the stairwell in case somebody was inside the apartment. [] The [*sic*] entered the apartment with their guns drawn, yelling, 'police, police, is anyone here, come out.' []

"Substantial evidence supports the finding by the trial court that the officers entertained a subjective belief the robber and/or Bettie Kaake might be in the apartment and that Bettie Kaake might be in danger. (See *People v. Leyba* (1981) 29 Cal.3d 591, 596-598.) Because the officers reasonably could have concluded on the basis of articulable facts that they were acting in an emergency situation, their entry into Bettie Kaake's apartment in response to the reasonably perceived exigency was justified. There was no response when the officers knocked and announced themselves, and entering the apartment was the only practical means of determining whether there was anyone inside in need of assistance. If there was, the delay incidental to obtaining a search warrant could have resulted in the unnecessary loss of life. Under the circumstances it was reasonable for the officers to believe that an immediate entry was necessary to render aid to anyone in distress. (See *People v. Hill* (1974) 12 Cal.3d 731, 755-756.)

"Finally, the only evidence seized in Bettie Kaake's apartment, consisting of the officers' observations of appellant's name and California Department of Corrections number and the photograph of Steven Smith, were in plain sight as the

officers walked through the apartment. Thus, the officers' plain sight observations in the apartment were the product of a search which was constitutionally permissible with respect to both its inception and scope.

"The trial court properly denied the motion to suppress. []"

SIMS, J.